

Message

From: Hurlid, Kathy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F3B04131F1145FCB4CCF5B0A64C1AC4-KHURLD]
Sent: 7/31/2020 1:58:07 PM
To: Chemerys, Ruth [Chemerys.Ruth@epa.gov]
Subject: RE: if you have a few minutes re Mindy questions on re Rose's draft

So two things, what you quote from the senate debate talks about delegation but the conference report makes clear it is not a delegation. So I recommend: **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Sent: Friday, July 31, 2020 9:45 AM
To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>
Subject: RE: if you have a few minutes re Mindy questions on re Rose's draft

Here's what I found and sent to Rose, in addition to what you already sent.

I found the following in the Senate Conference pp. 77-78 re Congress' the thinking about why states should assume 404

https://www.epa.gov/sites/production/files/2015-11/documents/sen_rept_1977_amendments_81-84.pdf

State programs

Testimony received established that the permit review process is appropriate for regulating discharges of dredged or fill material. During the last 2 years the section 404 permit review process resulted in e modification of more than 3,500 projects to protect the aquatic environment.

The committee amendment is in accord with the stated policy of Public Law 92-500 of "preserving and protecting the primary responsibilities and rights of States or prevent, .reduce, and eliminate pollution." It provides for assumption of the permit authority by States

with approved programs for control of discharges for dredged and fill material in accord with the criteria and with guidelines comparable to those contained in 402(b) and 404(b) (1). By using the established mechanism in section 402 of Public Law 92-500, the committee anticipates the authorization of State management of the permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national

pollutant discharge elimination system under the section should be able to assume the program quickly.

The use of this mechanism will also expedite State authorization because the Administrator only has to amend guidelines under section 304(b) of the act to establish the procedures and other requirements. a. State must meet to achieve approval of its program. Under the amendment, a State may elect to seek approval of a dredge and fill permit program independent of any application for approval of a National Pollutant Discharge Elimination System program. This will prevent any delay in processing applications for the National Pollutant Discharge Elimination System.

The amendment also provides that a State may elect to administer its dredge and fill permit program independent of the National Pollutant Discharge Elimination System program. Several States have already established separate State agencies to control discharges of dredge or fill materials. These agencies need not be the same as the National Pollutant Discharge Elimination System agency. The committee expects the Administrator to insist that any designation of a non-National Pollutant Discharge Elimination System agency be accompanied by a demonstration of full capability to adequately administer this program.

The amendment encourages the use of a variety of existing or developing State and local management agencies and recognizes mapping, protective orders, standards of performance and the like as useful management tools. It is anticipated that State and local government will coordinate and integrate the permit program for discharges or dredged or fill material with the section 208(b) (4) program for regulating pollution from nonpoint sources and from the placement of materials where such placement results from activities that are explicitly exempted from obtaining section 404 permits.

From: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Sent: Friday, July 31, 2020 9:37 AM

To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Subject: RE: if you have a few minutes re Mindy questions on re Rose's draft

See responses below in Blue.

Regarding the second question, we did an internal survey in 2007 that identified retained waters as an issue,

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Sent: Friday, July 31, 2020 8:33 AM

To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: if you have a few minutes re Mindy questions on re Rose's draft

Hi Kathy-

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

I also found some additional language in the Senate Conference Report that we have on our website re Congress' support for States to assume 404, and sent that to Rose.

Sorry, I thought I sent some info yesterday (I'll check that it left my in box). Anyway there is some leg history highlighted in blue in what I did/will send that should help answer this question.

Need to just clarify that they submitted it to the NACEPT that didn't make changes and the report was sent the Administrator in June 2017.

Agree, I thought I had made such changes/clarification in other papers (e.g., retained waters) so you should be able to lift language from there. I've been real careful to say the FACA requested regulatory language (as the subcommittee recommended guidance or regs but the NACEPT said regs).

Thanks!

PS Where are you headed on vacation? We can't go to Maine, but are looking at other options.

Ex. 6 Personal Privacy (PP)

From: Chemerys, Ruth

Sent: Monday, July 27, 2020 3:36 PM

To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background - Mindy questions for you re Rose's draft

As you can see, I wanted to get back to Mindy and decided to hedge on dispute resolution. If you have an idea when you might be able to draft something, or see if Megan can work on it, I can let Mindy know.

Also, Mindy reviewed Roses' draft background sections and there are a few questions for you - when you get a chance.

Ex. 5 Deliberative Process (DP)

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Here are a few questions:

1. Re "In the 1977 Amendments to the CWA, gave States the option of assuming the 404 permit program in certain waters of the State, subject to EPA approval."

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There is also a placeholder in the summary for examples of technical fixes, which we can add later.

Ruth

From: Hurlid, Kathy <Hurlid.Kathy@epa.gov>
Sent: Monday, July 27, 2020 3:09 PM
To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks for not waiting for me! You could end up waiting a while this week. Sorry.

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Sent: Monday, July 27, 2020 3:04 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks Mindy. This is helpful.

Ruth

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Sent: Monday, July 27, 2020 3:02 PM
To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Hi Ruth,

^[1] <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>.

In response to your questions,
ESA FRN probably does make sense
then probably address more of
Makes sense to hold off on effort
I'm fine pushing dispute resolution
No word on mitigation, so I will

Ex. 5 Deliberative Process (DP)

I have time this week, so I can take a look at the draft EA to get a feel for direction knowing that it isn't done.

Thanks,
Mindy

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From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Sent: Monday, July 27, 2020 2:03 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Hurlb, Kathy <Hurlb.Kathy@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Hi Mindy-

I updated slightly to reflect the items sent today, and changed to today's date. Regarding status and questions on a few sections:

Preproposal outreach:

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Sent: Monday, July 27, 2020 8:06 AM

To: Kwok, Rose <Kwok.Rose@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks Rose! I think this is off to a good start. I agreed with your suggestion about moving up the legal background, which I did as well as moving other pieces around to address the narrative arc. This is something Dave is particularly interested in – telling the story. You will also see some bubble comments suggesting building in a little more history in certain places.

Let me know if you want to talk.

Thanks,
Mindy

Mindy Eisenberg
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From: Kwok, Rose <Kwok.Rose@epa.gov>

Sent: Thursday, July 23, 2020 10:40 AM

To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Subject: Draft 404(g) preamble sections for review: upfront and background

Sorry for the delay – here were the parts that I worked on with some placeholders where things can be added

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